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Supreme Court of

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v.

FOX MCKEITHEN, S
of Louisia

On Appeal from the Unite
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BRIEF IN OPP
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OSITION TO
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1187

WILLIE HUNTER, JR.,

Appellant,

v.

FOX MCKEITHEN, Secretary of State of Louisiana, *et al.*,

Appellees.

On Appeal from the United States District Court for the Western District of Louisiana

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BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

This brief is filed in order to make the following points in response to the Motion to Dismiss or Affirm.

1. Part I of the Motion to Dismiss or Affirm is entirely a critique of the substance of the Attorney General's objection to the voting changes at issue. The defendants contend that because *LULAC v. Clements*, 914 F.2d 620 (5th Cir. 1990) (en banc), *cert. granted*, Nos. 90-813 and 90-974 (Jan. 18, 1991), held Section 2 inapplicable to the election of judges, the Attorney General acted improperly in partially basing his Section 5 objection upon the Section 2 infirmities growing out of the at-large election of the judgeships involved in this case. (Motion at 8-12). However, the court below has no jurisdiction to review the substance of the Attorney General's objection, and neither does this Court on appeal.

United States v. Board of Supervisors of Warren County, 429 U.S. 642, 645-646 (1977). The only question is whether Section 5 is applicable, and this Court previously has held that it is. *Brooks v. State Board of Elections*, No. CV 288-146 (S.D. Ga. Dec. 1, 1989) (three-judge court), *aff'd mem.*, 111 S.Ct. 288 (1990); *Haith v. Martin*, 618 F.Supp. 410 (E.D.N.C. 1985) (three-judge court), *aff'd mem.*, 477 U.S. 901 (1986). Even if the *LULAC* holding were relevant, it is being reviewed by this Court on writs of certiorari, and it is the plaintiffs' contention here that *LULAC* was decided wrongly.

2. As for the defendants' claim that "[t]he Justice Department . . . insists . . . Louisiana should change its entire judicial electoral selection process by adopting a limited voting or cumulative voting scheme," (Motion at 14-15), that also goes to the merits of the Attorney General's objection. Moreover, it is inaccurate. The Attorney General has objected in this case to only two city court judgeships, not to the entire judicial election system, and his October 23, 1990 objection letter stated that a number of potential remedies are available to the State. (J.S. App. 15a-16a). In no way is the Attorney General insisting that Louisiana adopt limited or cumulative voting to elect its judgeships.

3. The defendants are off-base in their discussion of the Solicitor General's position and this Court's denial of certiorari in the Section 2 majority vote runoff case of *Whitfield v. Clinton*, No. 90-383. (Motion at 17-18, 22). That case has no relevance to the present litigation, which involves the district court's failure to enforce the Attorney General's Section 5 objection to at-large elections for two city court judgeships.

4. The defendants cite *Berry v. Doles*, 438 U.S. 190, 192-193 (1978), for the proposition that the illegal elections in the present case should not be set aside, but should remain in effect while the State seeks Section 5 clearance. (Motion at 19-21). Of course, in *Berry*, no clear-

ance had previously been sought and the defendants there contended that the particular elections at issue had not been held pursuant to the uncleared change. 438 U.S. at 192. Under those circumstances, this Court ordered that the defendants be given thirty days in which to seek clearance. By contrast, in the present case, clearance has been sought from the Attorney General and has been denied. Of more relevance than *Berry* is this Court's statement in the post-*Berry* case of *NAACP v. Hampton County Election Commission*, 470 U.S. 166 (1985): "[I]f [the Attorney General's] approval is not forthcoming, the results of the . . . election should be set aside." *Id.* at 182-183. In the present case, the Attorney General's approval has been sought and is not forthcoming. The elections should therefore be set aside.

5. In their Motion to Dismiss or Affirm, the defendants here suggest that because this case was filed after the candidate qualification period for the judgeships at issue, the relief given should be the same as that in *Berry* inasmuch as the *Berry* case also was filed after qualification had ended. They also imply that the failure to seek emergency injunctive relief from this Court until after the election occurred, but before the winners took office, somehow precludes the elections being set aside. (Motion at 20-21). In its decisions on the merits of Section 5 cases, this Court never has conditioned the ultimate form of relief upon the timing of the complaint, or upon the timing of any earlier application for emergency relief in this Court. Indeed, in *Hampton County*, in which this Court said elections must be set aside if the Attorney General's approval is not forthcoming, the case was filed only four days before the election at issue. 470 U.S. at 173. No application for an emergency injunction was filed in this Court in *Hampton County*. Thus, nothing in the timing of the present case precludes the operation of *Hampton County*'s rule that the elections must be set aside where the Attorney General withholds Section 5 clearance.

6. The question of the appropriate relief in this type of situation is being briefed on the merits in *Clark v. Roemer*, No. 90-952, in which this Court noted probable jurisdiction on January 18, 1991, and which is scheduled for oral argument on April 22, 1991.

Respectfully submitted,

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